

JUDY FLEISCHER)
 Claimant)
 VS.)
 Respondent)
METROPOLITAN COURT REPORTERS)
 Respondent)
 AND)
CGU INSURANCE COMPANY and)
WAUSAU INSURANCE COMPANIES)
 Insurance Carriers)

Docket No. 237,296

The respondent and one of its insurance carriers, CGU Insurance Company, appealed the September 24, 1999 preliminary hearing Order entered by Administrative Law Judge Brad E. Avery.

The claimant is a court reporter. This is a claim for cumulative trauma to claimant's arms, shoulders, neck and upper back while working for the respondent. The Application for Hearing filed with the Division contains a date of accident of "3/25/98 and continuing," as claimant continues to work.

By Order dated September 24, 1999, Judge Avery granted claimant temporary partial disability benefits. The respondent and CGU Insurance Company contend the Judge erred by (1) granting temporary partial disability benefits in a preliminary hearing award, (2) granting those benefits for a period before the date of the Application for Hearing, and (3) allegedly finding a different accident date for purposes of the temporary partial disability benefits than was found at an earlier preliminary hearing. Those are the only issues presented to the Appeals Board on this appeal.

After reviewing the record compiled to date, the Appeals Board finds:

1. This appeal should be dismissed.
2. This is an appeal from a preliminary hearing order. The Appeals Board's jurisdiction to review preliminary hearing findings is generally limited to the following issues:¹
 - (1) Did the worker sustain an accidental injury?
 - (2) Did the injury arise out of and in the course of employment?
 - (3) Did the worker provide timely notice and timely written claim?
 - (4) Is there any defense to the compensability of the claim?

Additionally, the Appeals Board may review those preliminary hearing orders where the Judge has otherwise exceeded his or her jurisdiction or authority.²

3. The respondent and CGU Insurance Company contend the Judge exceeded his jurisdiction by awarding temporary partial disability benefits at the preliminary hearing. The Appeals Board disagrees. The Board has previously held that temporary partial disability compensation is similar to temporary total disability compensation as both are intended as wage replacement. Therefore, the Appeals Board concludes that temporary partial disability benefits may be awarded at a preliminary hearing. In an earlier decision,³ the Appeals Board held:

Like temporary total disability compensation, temporary partial disability compensation is intended solely as wage replacement. In this respect, temporary partial disability compensation is akin to temporary total disability compensation, as opposed to permanent partial disability compensation. This distinction is made evident by K.S.A. 44-510e(a) which provides in part:

“If the employer and the employee are unable to agree upon the amount of compensation to be paid in the case of injury not covered by the schedule in K.S.A. 44-510d and amendments thereto, the amount of compensation shall be

¹ K.S.A. 1998 Supp. 44-534a.

² K.S.A. 1998 Supp. 44-551.

³ Brown v. Lawrence-Douglas County Board of Health, WCAB Docket No. 205,848 (March 1996).

settled according to the provisions of the workers compensation act as in other cases of disagreement, except that in case of temporary or permanent partial general disability not covered by such schedule, the employee shall receive weekly compensation as determined in this subsection during such period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks. Weekly compensation for temporary partial general disability shall be 66 2/3% of the difference between the average gross weekly wage that the employee was earning prior to such injury as provided in the workers compensation act and the amount the employee is actually earning after such injury in any type of employment, except that in no case shall such weekly compensation exceed the maximum as provided for in K.S.A. 44-510c and amendments thereto.

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment." (Emphasis added.)

The calculation for temporary total disability compensation is, likewise, tied to the average gross weekly wage that the employee was earning prior to his injury. K.S.A. 44-510c(b)(1) provides:

“Where temporary total disability results from the injury [W]eekly payments shall be made during such temporary total disability, in a sum equal to 66 2/3% of the average gross weekly wage of the injured employee, computed as provided in K.S.A. 44-511 and amendments thereto”

Further evidence that temporary partial disability is treated the same as, and is considered a form of, temporary total disability is contained within the provisions of K.S.A. 44-510e(a)(2). This provision provides for the calculation of the number of weeks payable for permanent partial disability compensation by subtracting from the 415 weeks the total number of weeks that temporary total disability compensation was paid. This provision has, likewise, been held applicable to temporary partial disability compensation. In other words, the equivalent weeks of temporary partial disability compensation are subtracted from the 415 weeks to find the total number of weeks available for an award of permanent partial general disability. See Richardson v. Wichita Arms, Inc., Docket No. 176,396, (Appeals Board Order dated August 19, 1994).

4. Next, the respondent and CGU complain that the Judge awarded claimant temporary partial disability benefits for a period of weeks before the Application for Hearing was filed. The Appeals Board concludes that the Judge did not exceed his jurisdiction or authority in that regard. Treating temporary partial compensation akin to temporary total compensation, the Judge has the authority to grant temporary partial disability benefits for whatever period that they may be due.⁴

5. Finally, the respondent and CGU Insurance Company contend the Judge exceeded his jurisdiction by allegedly finding a different accident date from that allegedly found at an earlier preliminary hearing. Assuming that contention were true, the Judge has that authority. The preliminary hearing process is ongoing and continuing in nature and, therefore, findings may be changed as the facts develop. Further, the Appeals Board has held on numerous occasions that a judge's date of accident finding is not, by itself, an appealable issue from a preliminary hearing order.

6. Because Judge Avery did not exceed his jurisdiction or authority, and because the issues raised by the respondent and CGU are not otherwise reviewable from a preliminary hearing order, this appeal should be dismissed.

⁴ K.S.A. 1998 Supp. 44-534a(a)(2).

7. As provided by the Workers Compensation Act, preliminary hearing findings are not final but subject to modification upon a full hearing on the claim.⁵

WHEREFORE, the Appeals Board dismisses the appeal leaving Judge Avery's September 24, 1999 Order in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of November 1999.

BOARD MEMBER

c: Leah Brown Burkhead, Mission, KS
Kip A. Kubin, Overland Park, KS
David J. Bogdan, Kansas City, MO
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director

⁵ K.S.A. 1998 Supp. 44-534a(a)(2).